Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JUDY BAAR TOPINKA, STATE TREASURER, STATE OF ILLINOIS,

Petitioner,

v.

COMMONWEALTH EDISON COMPANY and TRUSTEES OF THE COMMONWEALTH EDISON COMPANY SERVICE ANNUITY FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Employee Retirement Income Security Act of 1974 (ERISA) expressly supersedes any State law insofar as the State law "relate[s] to" an employee benefit plan. The Illinois Uniform Disposition of Unclaimed Property Act provides that when unclaimed for five years, any intangible property in the possession of any fiduciary is presumed abandoned and is to be delivered into the protective custody of the Department of Financial Institutions of the State of Illinois.

The question presented by this petition is:

> Is Illinois' general unclaimed property statute preempted by ERISA when applied to pension plan benefits held by Commonwealth Edison Company's pension plan, an ERISA fiduciary, and unclaimed by the beneficiary for more than five years?

LIST OF ALL PARTIES

The caption of this petition lists as respondents all of the appellees in the proceeding in the Court of Appeals.

The petitioner herein is Judy Baar Topinka, the State Treasurer of Illinois. The appellant in the Court of Appeals was Sarah D. Vega, Director of the Department of Financial Institutions, State of Illinois. Although Ms. Vega was the proper appellant in the Court of Appeals, the State Treasurer of Illinois is the petitioner named herein because, as of July 1, 1999, all the rights, powers, duties, and functions previously vested in the Department of Financial Institutions with respect to the administration of the Illinois Uniform Disposition of Unclaimed Property Act were transferred by statute to the State Treasurer. Ill. Public Act 91-0016, §5; 15 ILCS 505/0.02.

The petitioner is not a corporation; no disclosure of parent companies and subsidiaries pursuant to Rule 29.6 is required.

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Petitioner Judy Baar Topinka, State Treasurer of Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit that declared that ERISA preempts the State of Illinois' Uniform Disposition of Unclaimed Property Act as applied to unclaimed pension plan benefits.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1-9) is reported at *Commonwealth Edison Company v. Vega*, 174 F.3d 870 (7th Cir. 1999). The underlying opinion of the District Court (App., *infra*, 10-31) is unreported.

STATEMENT OF JURISDICTION

On April 13, 1999, the Court of Appeals entered its opinion and judgment affirming the judgment of the District Court. 28 U.S.C. §1254(1) confers upon this Court the jurisdiction to review on a writ of certiorari a judgment entered in a case in a federal court of appeals.

STATUTORY PROVISIONS

The preemption provision (§514(a)) of the federal Employee Retirement Income Security Act of 1974 (ERISA) states, in pertinent part, that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefits plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. §1144(a).

The fiduciary property provision of the Illinois Uniform Disposition of Unclaimed Property Act states, in pertinent part, that "[a]ll intangible personal property and any income or increment thereon, held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within 5 years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary . . . ." 765 ILCS 1025/7 (1998).

STATEMENT OF THE CASE

Since 1961, there has been in effect in Illinois an unclaimed property law that deals comprehensively with all kinds of intangible property that is presumed abandoned upon expiration of a period of time after the property becomes payable or distributable. Illinois' Uniform Disposition of Unclaimed Property Act provides for the abandoned property to be taken into the State's protective custody; the State becomes the custodian in perpetuity, thereby safeguarding that property for the lost or missing owner and preserving it for delivery whenever that owner comes forward to claim it. It covers property held by any fiduciary. It does not explicitly address ERISA plans and does not single out such plans for special treatment or create rights or duties unique to such plans.

Commonwealth Edison Company, an Illinois public utility, is a fiduciary of its pension plan, called the Service Annuity System. The plan is a defined-benefit employee pension plan subject to ERISA requirements. It is solely funded by the Company, which also pays almost all of the expenses incurred in its administration. Vested annuity payments to participants and beneficiaries are made bi-monthly from a checking account maintained by the plan trustees. The amount of funds in the checking account are kept at levels sufficient to pay benefit checks issued. The plan documents contain no provision requiring benefit check payees to cash their checks within a certain time. If a benefit check is not cashed within one year, however, that check is written-off, the checking account is reduced by the amount of the uncashed check, and the

funds allocated for payment of the uncashed check become available to the plan to pay benefits to other benefit payees.

The plan documents do not address what disposition is to be made of uncashed checks or the payment of stale-dated checks; neither do they provide for forfeiture or subsequent reinstatement of unpaid benefits due to lost or missing payees. As a matter of administrative practice, however, the System has been paying claims by payees holding uncashed benefit checks even though those checks were uncashed for years. The sum of approximately $125,000 is now due to benefit check payees who have not cashed their benefit checks for more than five years after those checks were issued.

On January 2, 1997, Commonwealth Edison Company and the trustees of its employee pension fund commenced an action in the District Court, seeking a declaratory judgment that ERISA preempts the Illinois Uniform Disposition of Unclaimed Property Act as it applies to the pension fund's obligations for vested benefits represented by benefit checks that have been uncashed for over five years after their issuance. The District Court had jurisdiction of that action pursuant to 29 U.S.C. §1132(e)(1), which grants that Court exclusive jurisdiction of civil actions brought by an ERISA fiduciary. Since that action also involved construction of ERISA's preemption provision, the District Court also had jurisdiction under 28 U.S.C. §1331, which grants that Court original jurisdiction of all civil actions arising under federal law.

On May 8, 1998, the District Court held that ERISA preempts the Illinois unclaimed property act. It con-

cluded that "this suit lies in the netherworld between clearly preempted suits which implicate the interpretation or administration of an ERISA plan and suits that merely address the relationship among parties incidental to the administration of beneficiaries' rights under a plan" (App., *infra*, 24). While recognizing that "there are pros and cons to each side's position," it determined that it was not the Court's task "to divine the best possible interrelationship between ERISA and the [Illinois unclaimed property act]" (App., *infra*, 28, 31). Instead, the District Court deferred to United States Department of Labor Advisory Opinion 78-39, dated December 22, 1978, which concluded that ERISA preempts the Illinois unclaimed property law because ERISA does not merely preempt state laws which conflict with ERISA, but all state laws related to employee benefit plans.

On the appeal from the District Court judgment taken by the Illinois administrator, the Court of Appeals affirmed, holding that State unclaimed property laws are preempted by ERISA because they "directly and substantially" (App., *infra*, 4) relate to an ERISA plan by (1) depleting plan assets by confiscating the accrued interest that could be earned on the uncashed pension benefits and (2) usurping the administration of plan assets themselves. It found that State unclaimed property laws are a "device by which the state appropriates" for itself "the interest value of the money" that the plan would use to pay the uncashed pension benefit when claimed by the payee (App., *infra*, 5). Even though the Commonwealth Edison Company plan did not have a provision for the payment of any accrued interest to a payee, retention of the unclaimed benefits

allows the plan itself to earn interest until the payee claims the benefit; thus, plan assets would grow and "the less money Com Ed will be required to contribute to it to make sure that the plan has enough to meet its obligations" (App., *infra*, 4).

The Court of Appeals further found that State unclaimed property laws usurp the administration of an ERISA plan because until a pension is actually paid to the beneficiary, the money due to the beneficiary remains an asset of the plan. If the money to pay an unclaimed benefit was delivered to the State even after a benefit check remained uncashed for more than five years, the court reasoned, the State would then become the plan administrator, in violation of ERISA's provisions that plan assets be held for the exclusive purpose of providing benefits and defraying administration expenses (App., *infra*, 4-5). The court found no need to consider deference to the Department of Labor Advisory Opinion, noting a "complication" in deferring in this case, namely the issue "whether it is appropriate to defer to an agency that is seeking to expand federal power at the expense of the states through a generous construal of a preemption clause" (App., *infra*, 8). At the same time, it noted that the United States Department of the Treasury had issued a regulation "that can be interpreted to assume that uncashed ERISA plan benefits are subject to state escheat laws" (App., *infra*, 9).

REASONS FOR GRANTING THE WRIT

There are two reasons why this petition should be granted. First, the decision of the Court of Appeals for the Seventh Circuit, holding that ERISA preempts Illinois' unclaimed property act, conflicts with that of the Court of Appeals for the Second Circuit in *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 149 (2d Cir. 1989), *cert. denied*, 493 U.S. 811 (1989), which held that ERISA does not preempt Connecticut's unclaimed property act "as it applies to uncollected drafts for employee benefits." Second, the Seventh Circuit decided this case in a manner that is wholly inconsistent with the ERISA preemption analysis mandated by this Court, ignoring the presumption against preemption while at the same time disregarding and derogating the State of Illinois' public policy concerning the disposition of abandoned property, a legitimate public concern that arises in the absence of any contrary or applicable federal policy. As acknowledged by the District Judge below, the issue presented by this case is "important" (App., *infra*, 31).

A. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION IN THIS CASE AND THE SECOND CIRCUIT'S DECISION IN *BORGES*.

The holding of the Seventh Circuit below conflicts with that of the Second Circuit in *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 149 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989). This Court should grant review to resolve that conflict on an important issue that could

effect substantial sums in unclaimed intangible property.

In *Borges,* the Second Circuit held that "ERISA does not preempt Connecticut's escheat law[1] as it applies to uncollected drafts for employee benefits." *Id.* Consistent with the ERISA preemption analysis that would later be prescribed by this Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), the *Borges* court explained that "[t]he purpose of Congress is the ultimate touchstone in determining whether a federal law preempts a state law." *Borges,* 869 F.2d at 144. The Second Circuit began its analysis with the assumption that, unless Congress' purpose to preempt is clear and manifest, the historic police powers of the State are not to be superseded. *Id.* It found that ERISA "does not prescribe any particular procedure for the handling of benefits that are awarded but uncollected" and does not "specify a time limit for honoring such claims." *Id.* In contrast, it also found that the "escheat of abandoned property is an area of traditional state authority." *Id.*, at 147. According to the court, the escheat law "does not focus specifically on ERISA plans or benefits; it applies to lost or abandoned property generally." *Id.* It has "no effect" on the original determination of an employee's eligibility for benefits. *Id.* It does not provide

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[1] The custodial taking of property presumed abandoned is often subsumed under the concept of escheat. As explained by this Court, "[s]tates as sovereign may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat." *Delaware v. New York*, 507 U.S. 490, 497 (1993) (footnote omitted).

beneficiaries "with an alternative cause of action for recovering benefits." *Id.*, at 148. Its procedures for returning unclaimed property to the previously lost or missing owner "are no more complex" than those if a claim was made to the plan and essentially involve "presentation of proper identification." *Id.*

With the State serving as custodian for the missing beneficiaries, the Second Circuit pointed out that State escheat law actually "may aid beneficiaries." *Id.* It also found that escheat "poses no greater threat of inconsistency among state laws than does garnishment," a State process that is not preempted by ERISA. *Id.*, at 147. The Court rejected the notion that increased costs to an ERISA plan resulting from application of a State law by itself requires that the State law be invalidated (*id.*); "'if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress.'" *Id.*, at 145, (quoting *Rebaldo v. Cuomo*, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985)). The Second Circuit concluded that "[a]bsent more specific direction from Congress, [the Court] can safely assume that Congress did not intend to create [for ERISA plans] an exception to this traditional exercise of state authority." *Borges*, 869 F.2d at 147-48.[2]

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[2] This decision of the Second Circuit is in accord with that of the Michigan Court of Appeals in *Attorney General v. Blue Cross & Blue Shield of Michigan*, 424 N.W.2d 54 (Mich. App. 1988), *leave to appeal denied*, 432 Mich. 888 (1989), which held that Michigan's unclaimed property law was not preempted by ERISA. The court found escheat to be a traditional ex-

(continued...)

In addition, relying upon the Second Circuit's decision in *Borges*, the Court of Appeals for the Eighth Circuit has also concluded that "state garnishment and escheat statutes do not shift control over benefit distribution," and "[n]either do they negate a proper ERISA provision." *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341, 1347 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992).

The Seventh Circuit's attempt to distinguish *Borges* by distinguishing escheat statutes from unclaimed property statutes like that in force in Illinois (App., *infra*, 7-8) is unavailing. *Borges* cannot be so distinguished

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[2] (...continued)
ercise of state authority; that the Michigan statute affected the plan only because it is the holder of abandoned property rather than because it was an ERISA entity; that the law did not affect the structure, administration, or type of benefits provided by the plan; and that "the mere fact that [the Michigan statute] has some impact on a plan does not require its preemption by ERISA." *Id.* at 59. The Michigan statute at issue expressly provided, without limitation, that an owner could claim the property from the State at any time. 19 Mich. Stat. Ann. §26.1053(53)(1) (Lawyers' Coop. 1993). The Seventh Circuit in the instant case was thus wrong when it attempted to distinguish the Michigan case by asserting that it was an escheat case in which title would have vested in the State (App., *infra*, 7-8). As the Michigan legislature stated, the Michigan Code of Escheats, "in all of its provisions, is intended to be a trustee and conservator measure for the initial purpose of marshaling, protecting and preserving the property rights and interests of the absent, incapacitated or missing owners of property, . . . whose rights and interests in such property it is the duty of government and law to protect. . . ." 19 Mich. Stat. Ann. §26.1053(64) (Lawyers' Coop. 1993). The Michigan Code of Escheats was, in fact, repealed and replaced by a version of the Uniform Unclaimed Property Act (1981), effective January 1, 1996 (Public Acts 1995, No. 29.).

because the action in that case was one for custody, not for the escheat of the abandoned property. The Connecticut statute's fiduciary property provision at issue in *Borges*, Conn. Gen. Stat. Ann. §3-61a (West 1988), was almost identical to that in the Illinois act. It imposed upon a fiduciary holding the property due to another a duty to "pay or deliver [abandoned] property to the treasurer and file, on forms which the treasurer shall provide, a report of unclaimed property." *Id.*, §3-65a(b). Only when the abandoned property was in the custody of the State Treasurer for more than twenty years was the Treasurer allowed to apply to the Superior Court for a judicial determination of escheat, a subsequent proceeding the authorization for which was repealed in 1994 (P.L. 94-184 §3).[3]

Thus, the unclaimed property laws involved in the instant case and that in *Borges* were not materially different insofar as their definitions of the subsisting rights of the lost or missing beneficiary to claim the property from the State's custody. The decisions of the Second and the Seventh Circuit are irreconcilable, leaving in doubt the relationship between ERISA and State unclaimed property laws concerning the disposition of abandoned pension benefits.

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[3] A state's right to escheat ownerless property exists independent of its unclaimed property law. On satisfaction of due process requirements of notice and an opportunity to be heard, a state may take title to such property. *Hamilton v. Brown*, 161 U.S. 256 (1896).

B. THE DECISION OF THE SEVENTH CIRCUIT RUNS AFOUL OF ESTABLISHED LAW REQUIRING A PRESUMPTION AGAINST PREEMPTION AND DEFERENCE TO STATE POLICY.

Since this Court's decision in *Travelers Insurance Co.*, a strictly literal reading of the concept of State laws that "relate to" ERISA has been rejected, along with the "connection with" test, which was found to be "an uncritical literalism [that] is no more help than in trying to construe 'relate to.'" *Id.*, 514 U.S. at 656. The overarching principle now underlying ERISA preemption analysis is the strong presumption that "Congress does not intend to supplant state law." 514 U.S. at 654-56. The Seventh Circuit, however, entirely ignored this approach to ERISA preemption analysis. Its decision shows no recognition of the presumption against preemption and no consideration for the salutary purposes and the public policy underlying State unclaimed property laws.

Underlying the Seventh Circuit's decision is the unprecedented and erroneous view that the crux of the litigation between the plan and company on one side and the State on the other was "who gets to keep the interest on th[e] money" used to pay the unclaimed pension benefits (App., *infra*, 4). No other court has ever disregarded the public policy underlying State unclaimed property laws by focusing exclusively on the supposed interest value of money. Long ago the Supreme Court found that "it is within the constitutional power of the state to protect the interests of [missing or lost owners] from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively aban-

doned." *Anderson National Bank v. Luckett*, 321 U.S. 233, 241 (1944). The Supreme Court has described the State's role concerning unclaimed property as that of a conservator of a missing person's property. *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 547 (1948). Additionally, the Supreme Court has stated that "[i]f [unclaimed property] is turned over to" the state, in obedience to a valid law, the obligation of the [holder of the property] to the [missing owner] is discharged." *Security National Bank v. California*, 262 U.S. 282, 286 (1923).

Consistent with this unclaimed property jurisprudence, in *People ex rel. Fahner v. Chicago Transit Authority*, 127 Ill. App. 3d 405, 408, 468 N.E.2d 1316, 1318 (1984), the Appellate Court of Illinois stated that the policy behind the Illinois Uniform Disposition of Unclaimed Property Act was to protect the rights of unknown owners. In light of this expressed policy in favor of state custody of abandoned property, and of the presumption that Congress does not intend to supplant state law, the Seventh Circuit should have been required to show that it was the clear and manifest purpose of Congress to have the pension plan take the interest value of money to pay unclaimed pension benefits. Nowhere in its discussion about the interest value of money did the court mention some relevant Congressional intent or cite any authority establishing that Congress ever contemplated such a matter. To the contrary, to permit an ERISA plan to retain unclaimed property so as to gain the interest value that might be earned on the property, a permission enjoyed by no other holder of unclaimed property, accords to the plan "a charmed existence that never was contemplated by

Congress." *Rebaldo v. Cuomo*, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

Accordingly, in substituting its views about State unclaimed property laws for those of this Court and State courts, the Court of Appeals violates the principle of federalism that "[a] federal court's independent determination of policy is quite irrelevant, . . . if it is inconsistent with the State law which the court is obliged to follow." *System Operations, Inc. v. Scientific Games Development Corp.*, 555 F.2d 1131, 1142 (3d Cir. 1977).

CONCLUSION

For the reasons stated, this Petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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